UNITED STATES GOVERNMENT

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

RES-CARE, INC. d/b/a TREASURE ISLAND
JOB CORPS CENTER,

Employer

and Case 20-RC-18004

CALIFORNIA FEDERATION OF TEACHERS,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[1] the undersigned finds:

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[1] The parties stipulated that the exhibits and transcript of the hearing in Case 20-RC-17984 and the Decision and Direction of Election issued in that case should be incorporated into the record in the instant case.

On October 15, 2004, I issued a Decision and Direction of Election in Case 20-RC-17984, involving the Employer and the Petitioner in the instant case as joint employers. In my decision, I applied *M.B. Sturgis*, 331 NLRB 1298 (2000), and directed that an election be held in a bargaining unit which combined employees solely employed by the Employer with employees jointly employed by the Employer and Alutiiq Professional Services, LLC, (Alutiiq), a supplier employer. Neither the Employer nor Alutiiq consented to the inclusion of its employees in the same unit with those of the other employer. Under *M.B. Sturgis*, it was permissible to include employees solely employed by the Employer in the same bargaining unit with employees jointly employed by the Employer and Alutiiq without the consent of either. By Order dated November 10, 2004, the Board granted the Request for

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that the Employer, a Kentucky corporation, is engaged in business as a social service agency providing educational and job training services to at-risk youth under a contract with the United States Department of Labor (DOL) at Treasure Island, California. The parties further stipulated, and I find, that during the twelve-month period immediately preceding the filing of the petition in this case, the Employer derived gross revenue in excess of $1,000,000 and purchased and received at its Treasure Island facility, goods and services valued in excess of $50,000 directly from points located outside the State of California. Based on the parties' stipulation to such facts, I find that the Employer is engaged in commerce and that it will effectuate the purposes and policies of the Act to assert jurisdiction in this case.

Review filed jointly by the Employer and Alutiiq of my Decision and Direction of Election. In these circumstances, the ballots at the election conducted on November 10, 2004, were impounded.

On November 30, 2004, the Board issued an Order remanding Case 20-RC-17984 to me for further appropriate action consistent with its decision in *Oakwood Care Center*, 343 NLRB No. 76, Slip Op. (November 19, 2004). In *Oakwood Care Center*, the Board overruled *M.B. Sturgis*, and held that a bargaining unit that combines employees who are solely employed by a user employer and employees who are jointly employed by a user employer and a supplier employer constitute a multi-employer bargaining unit and may be found to be appropriate only with the consent of both the user and supplier employers.

Because the election ordered in Case 20-RC-17984 was conducted in a unit which included employees solely employed by the Employer with those employed jointly by the Employer and Alutiiq, the supplier employer, and neither had consented to the inclusion of their employees in the same unit, under the Board's decision in *Oakwood Care Center* such a unit was not an appropriate unit for collective-bargaining purposes. In these circumstances, on December 6, 2004, I ordered that the election in Case 20-RC-17984, be set aside and considered a nullity, and that the record in that case be reopened and the case remanded to take additional evidence regarding the appropriateness of the petitioned-for unit, as well as other issues that were not developed at the hearing and were not addressed in my decision. On December 15, 2004, the petition in Case 20-RC-17984 was withdrawn and the Petitioner filed the instant petition seeking to represent a unit comprised solely of employees employed by the Employer at the Treasure Island Job Corps Center. On the same date, the Petitioner also filed a petition in Case 20-RC-18005 seeking to represent a unit comprised solely of employees employed by Alutiiq at the Treasure Island Job Corps Center.

At the hearing, the Employer's counsel represented that the Employer was preserving the argument it presented in Case 20-RC-17984, that the Board should not assert jurisdiction over it and should overrule *Management Training Corp., supra*, and return to the standard previously applied by the Board in *Res-Care, supra.* In the Decision and Direction of Election issued in Case 20-RC-17984, I rejected the Employer's argument in this regard and the Board, in an unpublished Order, dated November 30, 2004, declined to grant the Employer's request for review on this issue. The Petitioner takes the position that the Employer should not be permitted to relitigate this issue in the present case. However, as the instant matter involves a new petition for an election in a unit different from that sought in case 20-RC-17984, albeit involving the same Employer and Petitioner, I make no determination regarding whether it is proper to litigate this issue in this proceeding, and I leave it to the Board to decide whether it will hear this argument.

As indicated above, the parties have stipulated to the include in the record of the instant case, the exhibits and transcript of the hearing in Case 20-RC-17984, including the Decision and Direction of Election issued in that case and the stipulation of facts pertaining to the jurisdictional issue as set forth in that case. The Employer contends it is exempt from the Board's jurisdiction because of the control exerted over its operations and labor relations decision-making by the DOL, which prevents it from being able to engage in meaningful collective bargaining with the Petitioner. In this regard, the Employer requests that I overrule the Board's decision in *Management Training Corp*., and return to the standard previously applied by the Board in *Res-Care*. For the

following reasons, I decline to dismiss the petition and find that the Board has jurisdiction over the Employer.

Facts. The parties stipulated, and I find, that the manner in which the Treasure Island Job Corps Center is administered by the DOL is similar in all respects to the factual determinations made by the Board in *Res-Care*. This stipulation does not, however, extend to the legal determinations made by the Board or the Board's interpretation of federal law, but only to the factual determinations made in that case.

Analysis. In *Management Training Corp*., *supra*, 317 NLRB at 1358, the Board adopted the following two-prong test to determine whether it would assert jurisdiction over private sector employers with close ties to an exempt government entity: (1) Does the employer meet the definition of "employer" under Sec. 2(2) of the Act? and (2) Does the employer meet the Board's statutory and monetary jurisdictional standards? The Board also held that it would not analyze whether a private sector employer is a joint employer with the exempt government entity in order to determine jurisdiction. *Id*. at 1358 fn. 16. In so doing, the Board reasoned that although it has no jurisdiction over a government entity and cannot compel it to sit at the bargaining table, a private employer is capable of engaging in effective bargaining regarding terms and condition of employment within its control. *Id*. at 1358, fn. 16.

In *Management Training*, the Board overruled its decision in *Res-Care*, and rejected the test adopted therein pursuant to which the Board examined the control over essential terms and conditions of employment retained by both the employer and the exempt government entity and determined whether the employer is capable of engaging

in meaningful collective bargaining.[2] In so doing, the Board described the *Res-Care* test as "unworkable and unrealistic." Id. 317 NLRB at 1355. The Board recently reaffirmed *Management Training* and rejected a return to the *Res-Care* standard in *In re Jacksonville Urban League, Inc.*, 340 NLRB No. 156 (December 18, 2003). The Sixth, Fourth, and Tenth Circuits have upheld the *Management Training* doctrine. *Pikeville United Methodist Hospital of Kentucky v. NLRB,* 109 F.3d 1146 (6th Cir. 1997); *Teledyne Economic Development v. NLRB,* 108 F.3d 56 (4th Cir. 1997); *Aramark Corp. v. NLRB,* 156 F.3d 1087 (10th Cir. 1989). The Employer urges that I overrule *Management Training* and apply the *Res-Care* test to the instant proceeding. However, the only evidence proffered for this proposition is the above-noted stipulation that the facts of this case are similar in all respects to those in *Res-Care*, the case in which the Board specifically overruled in *Management Training.* The Employer stipulates that it satisfies the Board's discretionary jurisdictional standards and does not contest its status as an employer under the Act. Rather, it only repeats the same argument asserted in *Res-Care* to show the degree of control exercised over its operation by the DOL.

I am obliged to apply current Board law, which is set forth in *Management Training,* and reaffirmed by the Board in *In re Jacksonville Urban League, Inc.* As noted

[2] In *Res-Care*, the Board declined to assert jurisdiction over the employer, which operated a residential job corps center in Indiana under contract with DOL, finding that DOL imposed direct control over the Employer's wages and benefits by the requirement that DOL approve the employer's initially submitted budget; approve the employer's wage ranges, sick leave and vacation pay; and approve any changes in wage and benefit levels that had been previously approved by DOL. In that case, the Board noted that DOL required that the employer's wage rates be based on area standards and not exceed by 10% or more what the employees received in their former positions. Because of these direct controls over wages and benefits exerted by DOL in *Res-Care*, the Board concluded in that case that DOL's control over such essential terms and conditions of employment made meaningful collective bargaining by the employer impossible, and it declined to assert jurisdiction over the employer. The Employer in the instant case, as set forth above, has stipulated that the manner in which the Treasure Island Job Corps Center is administered by DOL is similar in all respects to the factual determinations regarding the administration of the job corps center in *Res-Care.*

above, in the Decision and Direction of Election issued in Case 20-RC-17984, I rejected the Employer's argument in this regard and the Board in its Order declined to grant the request for review filed by the Employer and Alutiiq on this issue. The Employer has presented no additional evidence nor raised any new legal arguments to challenge existing precedent. Accordingly, I find that the assertion of jurisdiction over the Employer is clearly warranted, and I decline to dismiss the petition.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.

4. The parties stipulated, and I find, that there is no contract bar to this proceeding.[3]

5. The parties stipulated, and I find, that the following unit is an appropriate unit for collective bargaining:

> All full-time and regular part-time residential advisors, senior residential advisors, administrative assistants, recreation specialists, career transition specialists, counselors, center protection officers, drivers, outreach and admissions specialists, career preparation specialists, student government advisors, finance specialists, finance clerks, purchasing department employees, record specialists, facility maintenance employees, food service department employees, property staff employees, center standard staff employees and receptionists employed by the Employer at its Treasure Island Job Corps Center, located at Treasure Island, California; and excluding all other employees, all employees of Alutiiq Professional Services, confidential employees, managerial employees, guards and supervisors within the meaning of the Act.

Evidence was presented at the hearing regarding whether the counselors in the stipulated unit are professional employees within the meaning of Section 2(12) of the Act

[3] At the hearing, the attorney for the Petitioner stated on the record that he is also the attorney for Teamsters Local 856 which previously represented the Employer's employees at the Treasure Island Job Corps Center, and that he was authorized to state on the record that Local 856 disclaimed any interest in the representing the employees in the petitioned-for unit.

who must be given the opportunity to vote in a self-determination election following the procedures of *Sonotone Corp*., 90 NLRB 1236 (1950). Although the record does not disclose the respective positions of the parties on this issue and no briefs were filed in this case, given that the matter was raised at the hearing, I make the following findings regarding the professional status of these positions.

The record reflects that there are approximately nine counselors, who report to the Employer's six area directors, who, in turn, report to the Center's director.[4] The prerequisites for hire for the counselor position include a bachelors degree; 15 additional semester hours/units in an area relevant to the job, such as in the area of psychology or atypical behavior; and one year of experience in the counseling field. However, the record discloses that the Employer often waives the 15 additional semester hour/unit requirement if a counselor commits to obtaining the hours and a waiver is obtained through DOL. The one year experience requirement is also often waived. Counselors are not required to be licensed or certified.

The counselors are the initial contact persons for all of the students in the Employer's program and they are expected to meet with students assigned to them at least once a month, including visiting with them in their dormitories. Each counselor has a caseload of about 125 to 130 students, who are generally assigned to a counselor on the basis of the student's vocational choice.

Counselors serve as advocates for the students to ensure that they obtain whatever they are entitled to within the program. They appear with students at formal disciplinary

[4] At least one of the area directors (i.e., the culinary area director) is an employee of Alutiiq. The area directors oversee the following areas: career preparation, culinary, building/construction trades, computer repair, and graphic arts and business, which includes accounting, word processing.

board proceedings and often advocate for the development of a contract plan to deal with a student's problems, rather than having the student expelled from the program. However, if a student is caught with alcohol or drugs, expulsion from the program is mandatory. If a student is expelled, the counselor accompanies the student to the dorm and assists the student in packing his belongings.

The counselors decide if a student may obtain a leave of absence from the program. However, the program has strict guidelines, which are spelled out in a DOL handbook, including guidelines for granting leaves of absence. Counselors often consult with the area directors in order to ensure consistency with the DOL standards in granting or denying leaves to students.

Counselors advise students about their scheduling and academic and career choices. They also assist students with such matters as dealing with fights and pregnancies, etc. While the record reflects that an educational plan is developed for each student during the first few weeks he or she is in the program, the record does not establish that the counselors are responsible for formulating such programs. However, the record reflects that counselors may recommend changes to the program. For example, they may recommend that a student pursue or "shadow" more than one trade in order to choose a career path.

Counselors as well as teachers and area directors may refer students for psychiatric services, and oftentimes it is the counselors who do so. However, the counselors do not provide any type of therapeutic counseling services, and are not certified or trained to do so. The counselors maintain files for the students assigned to them, and these files may contain confidential materials, including those from the

psychiatrist or psychologist who sees the student. Counselors are also required to keep file notes on all their communications with students.

Counselors attend weekly staff meetings and "cluster" and "wellness" group meetings, at which the staff discusses students and how to handle their issues and problems. Staff and cluster meetings are attended by area directors, residential advisors, counselors, instructors, as well as by psychiatrists, psychologists, and medical doctors. The wellness group includes counselors, the psychiatrist, psychologist, and a medical doctor, and it meets to discuss student health issues.[5] At these meetings, counselors inform those present about such matters as students' absences from class, and the number of disciplinary slips students have received. The counselors may also make recommendations about how the Center should deal with students' problems. Testimony in the record is to the effect that such recommendations are often followed by the Employer. However, no specific examples are given which illustrate such general testimony.

Analysis. As indicated above, the only issue presented with regard to the appropriateness of the unit is whether the counselors are professional employees who must be accorded a *Sonotone* election. As indicated above, it is not apparent from the record what the respective positions of the parties are as to this issue.

Section 2(12) of the Act defines a professional employee as:

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual,

[5] It appears from the record that the psychiatrist, psychologist and the medical doctor are not employees of the Employer but perform work for the Employer pursuant to a contract between the Employer and the University of California at San Francisco (UCSF). The Employer has a medical doctor from UCSF who is on call and another who is on staff.

> mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or (b) any employee, who has completed the courses of specialized instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

Section 2(12) defines a professional employee in terms of job content and responsibilities that the individual performs, rather than the individual's academic or technical training, job title or compensation. *Lincoln Park Zoological Society*, 322 NLRB 263 (1996); *Aeronca, Inc*., 221 NLRB 326 (1975); Loral Corp., 200 NLRB 1019 (1972); *Chesapeake Telephone Co*., 192 NLRB 483 (1971); *Westinghouse Electric Corp*., 163 NLRB 723, 726 (1967). The fact that a group of employees is predominantly composed of individuals possessing a degree in the field to which the profession is devoted, may tend to show that that the work they perform requires knowledge of an advanced type. See *Western Electric Co*. 126 NLRB 1346, 1348-1349 (1960). However, this factor is not controlling and all circumstances relevant to the inquiry must be examined. See *Express News Corp*., 223 NLRB 627 (1976).

The record does not establish that the counselors are professional employees within the meaning of Section 2(12) of the Act. While the record shows generally that they advise, guide and advocate for students in the program, it does not show that the counselors consistently utilize discretion and judgment of a professional nature as is

required by Section 2(12) of the Act. Rather, the record shows that the counselors work as part of a team of staff members, which includes other professional employees (e.g., psychiatrists, psychologists and medical doctors) and managerial level staff (e.g., area directors) who appear to collectively make decisions about students in the Job Corps program. Counselors are not qualified to provide therapeutic services to students.[6] It appears from the record that the counselors perform a reporting function to the professional staff members with regard to informing them about student absences and disciplinary slips. The record also discloses that the counselors' decision-making, such as with regard to granting leaves of absence to students, is strictly controlled by DOL regulations, the consistent application of which is ensured by their consultations with area directors. Further, the additional academic and experience requirements for the counselor position beyond that of a college degree are often waived. In these circumstances, I find that the counselors are not professional employees. *Lincoln Park Zoological Society, supra; Twin City Hospital Corp, supra*; *Norton Community Hospital*, *supra*; *Express News Corp*., *supra*; *Aeronca, Inc*., *supra*. Therefore, I am not ordering a *Sonotone* election in this case.

Accordingly, I am directing an election in the following unit as stipulated to by the parties and which I find to be an appropriate unit:

> All full-time and regular part-time residential advisors, senior residential advisors, administrative assistants, recreation specialists, career transition specialists, counselors, center protection officers, drivers, outreach and admissions specialists, career preparation specialists, student government

[6] In this regard, I find that this case is distinguishable from *Catholic Bishop of Chicago*, 235 NLRB 776, 779 (1978), where the Board found to be professional employees, three social workers who provided counseling services to parents, worked with the employer's psychologists, and where they were qualified to provide therapeutic treatment to students.

> advisors, finance specialists, finance clerks, purchasing department employees, record specialists, facility maintenance employees, food service department employees, property staff employees, center standard staff employees and receptionists employed by the Employer at its Treasure Island Job Corps Center, located at Treasure Island, California; excluding all other employees, all employees of Alutiiq Professional Services, confidential employees, managerial employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION[7]

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an

[7] The Employer does not contest the inclusion of substitute residential advisors in the unit. Further, the parties agree that the *Davison-Paxon*,185 NLRB 21 (1970), formula for determining voter eligibility should be applied in this case. The Petitioner has requested, however, that I adjust the time frame for applying this formula to take into account the holiday period from December 16, 2004, to January 4, 2005, when the Employer was not providing classroom instruction. I have considered the representations made by the Petitioner's counsel in this regard, but find no basis to alter the standard time period for application of the *Davison-Paxon* formula.

economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by CALIFORNIA FEDERATION OF TEACHERS, AMERICAN FEDERATION OF TEACHERS, AFL-CIO.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966*); NLRB v. Wyman-Gordan Company,* 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, 901 Market Street, Suite 400, San Francisco, California 94103, on or before February 4, 2005. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570.

This request must be received by the Board in Washington by February 11, 2005.

DATED at San Francisco, California, this 28th day of January, 2005.

__/s/ Robert H. Miller_____
Robert H. Miller, Regional Director
National Labor Relations Board
Region 20
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